THE BANK OF CANTON LTD. v. DART SUM TIMBER (PTE.) LTD.

[O.C.J. (D'Cotta J.) October 10, 1980]
[Singapore — Suit No. 1401 of 1977]

Company Law — Guarantee made by company director — Whether authorised to execute guarantee on behalf of company.

Guarantee — Execution of guarantee by company director — Whether ultra vires — Scope of s. 133A added by Companies (Amendment) Act, 1974 — Whether of retrospective effect.

Statutory Interpretation — Rule of construction applied — Ambiguity resolved in favour of person charged.

The plaintiffs in this case claimed for $401,793.70 and interest under a written Guarantee of July 31, 1974 by which the defendants guaranteed payment on demand of all moneys which were then or might thereafter be owing by Ta Leong Produce (Pte.) Ltd. on the general balance of its account with the plaintiffs. The claim was in respect of four advances made on Letters of Credit.

The Guarantee was executed by Wong Kee Loh and Ong Say Beng, both directors of the defendants and was in compliance with clause 97 of the Articles of Association.

The defendants contended that the Guarantee was signed without their authority and that the advances were made in violation of section 133A added by the Companies Act 1974 which came into operation on November 15, 1974.

The facts revealed that Wong owned 400,000 shares in Ta Leong and the official address of Ta Leong and the defendants was the same.

Held, allowing the claim: (1) the defendants were fully aware that Wong had executed the Guarantee on their behalf and it was done with their consent and acquiescence;

(2) section 133A added by the Companies (Amendment) Act, 1974 is irrelevant to the present case. The said Amendment came into operation on November 15, 1974, affects all guarantee made on or after that date. There is no reason or justification for giving the section retrospective effect.

Cases referred to:-

(1) *Royal British Bank* v. *Turquand* (1856) 6 E.L. & B.L. 327; [1843-60] All E.R. Rep. 435.

(2) *Hely-Hutchinson* v. *Brayhead Ltd.* [1968] 1 Q.B. 549, 583.

CIVIL SUIT.

K.S. Chung for the plaintiffs.

Y.M. Jumabhoy for the defendants.

Cur. Adv. Vult.

D'Cotta J.: The plaintiffs' claim is for $401,793.70 plus interest under a written Guarantee dated July 31, 1974 (Exhibit P2) by which Dart Sum Timber (Pte.) Ltd. (hereinafter called "the defendant company") guaranteed payment on demand of all moneys which were then or might thereafter be owing by Ta Leong Produce (Pte.) Limited (hereinafter called "Ta Leong") on the general balance of its account with the plaintiffs.

The claim is in respect of four advances made on Letters of Credit as follows: —

(1)	Letter of Credit No. CB-21145 dated October 25, 1975 ...	$124,176.74
(2)	Letter of Credit No. WTB-21422 dated November 21, 1975 ...	$ 75,763.13
(3)	Letter of Credit No. WTB-21455 dated November 25, 1975 ...	$ 37,824.35
(4)	Letter of Credit No. WTB-21441 dated November 25, 1975 ...	$122,921.63

The Guarantee was executed by Wong Kee Loh (hereinafter called "Wong") and Ong Say Beng both directors of the defendant company and was in compliance with Clause 97 of the Articles of Association — Exhibit P1.

The defendants contend that they did not authorise the signing of the Guarantee and that the Guarantee so signed was without their authority, express or implied; furthermore the defendants also contend that the advances were made in violation of section 133A of the Companies Act (No. 10 of 1974) which came into operation on November 15, 1974.

The questions for consideration of the court are as follows: —

(1) Was the Guarantee *ultra vires;*

(2) Did Wong have authority to sign the Guarantee;

(3) Is the Guarantee unenforceable under section 133A of the Companies (Amendment) Act;

(4) Has a valid demand been made.

Incidentally Wong was last seen and heard of in Singapore in March 1976.

On the question of *ultra vires,* according to the Memorandum and Articles of Association of the defendant company, one of the objects for which the defendants was established under Clause 3(p) was "to guarantee the obligations and contracts of customers and others". It is quite obvious from this that the defendant company has express powers to guarantee contracts of its customers.

It will be observed that the composition of Ta Leong as at June 30, 1974 comprised the following directors: Ong Say Beng, Wong Kee Loh, Hii Siu Chiong, Ting Hie Ing and Hii Yii Pan.

The paid up capital at that time was 600,000 of which Wong owned 400,000 shares. It is also important to note that the official address of Ta Leong and the defendant company was given as 6-A, 6th Floor, Far Eastern Bank, 156, Cecil Street, Singapore. According to the evidence both offices shared the same premises with a glass partition separating them and the name plates of the two offices were placed one on top of the other.

It is pertinent to note also that Wong figured prominently in the defendant company and according to the extract from the Companies register in 1974, the defendant company had four directors, namely, Wong Kee Loh, Ong Say Beng, Hii Yii Pan and Tan Kian Kuen of whom no mention was made throughout the proceedings and who can be presumed to have no say in the running of the company. The number of shares taken up to August 16, 1974 was 820,000 of which Wong and his wife owned 449,000 shares i.e. 54% of the total amount of shares issued. The other directors owned the remaining shares of which Hii Yii Pang had only 105,000 shares.

The next question for consideration is — Did Wong have authority, express or implied, to execute the Guarantee on behalf of the defendants, the Guarantee being executed by Wong and Ong Say Beng. In considering this, it is most desirable to refer to the

evidence i.e. to the conduct of the parties and the surrounding circumstances at the time of the execution of the Guarantee. It is also important to note that Wong signed all the directors reports; he was the managing director of the defendant company; he also signed the balance sheets, cheques and Annual Reports. He was elected Chairman of the defendant company. In fact, according to the evidence of PW1 Yap Siong Eu, the Regional Adviser to the Bank of Canton who used to visit the office of the defendant company from time to time, he said that his impression was that "Wong was the boss of the show" and he was satisfied that Wong was representing the defendants. Yap also stated in his evidence that he made searches in the Registry of Companies and ascertained the position of Wong and his shareholdings before requiring the defendant company's Guarantee which Wong gave him duly signed by himself and witnessed by Yap. Where the persons managing a company do so in a manner consistent with its Articles and Memorandum of Association such persons dealing with the company are not affected by any internal irregularities — *Royal British Bank* v. *Turquand*.[1]

Being the managing director of the defendant company as he then was, Wong had authority, it may be either express or implied and in this connection, that is what Lord Denning M.R. in *Hely-Hutchinson* v. *Brayhead Ltd.*,[2] had to say: —

"It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case."

Having regard to the shareholdings of Wong and his wife together amounting to 54% of the entire issued share capital and having regard to the evidence of Hii Yii Pan himself that each director had copies of the Memorandum and Articles of Association and the annual audited accounts of the company, there is no doubt that Wong had full power express, ostensible and implied to execute the Guarantee on behalf of the defendant company. Wong was also involved in opening an account for the defendant company with the Bank of America in February 1977 and arranging credit facilities to finance the export of timber from Sarawak, one of the two main commodities which the defendants dealt with — the other being pepper.

As against this, we have the evidence of Hii Yii Pan one of the directors of the defendant company who said that the only function of Wong as Chairman of the defendant company was to sign cheques; apart from that he performed no other functions. Furthermore, he stated that Wong was unfamiliar with the timber trade. On important matters he would have discussions with Wong but apart from this Wong played no active part in the company whatever. He never gave instructions to Wong to open the bank account or raise loans for the company. He was shocked when he first received a letter from the solicitors of the plaintiffs regarding the alleged claim against the letter of guarantee. He never made any representations to PW1 Yap Siong Eu as regards Wong's authority. Furthermore, he alleged the letters of guarantee were a fraud on him by Wong and PW2 Ong Say Beng against the company. Under cross-examination, however, Hii Yii Pan contradicted himself. He never knew when he was appointed a director or when Wong was appointed a director. He admitted that Wong was authorised to sign applications for letters of credit, that Wong could sign directors reports and balance sheets, that Wong could out vote him on any matters by virtue of his shareholdings. A close scrutiny of the evidence of Hii Yii Pan and the answers he gave to questions in cross-examination showed that he knew nothing of the running of the business. I did not believe him and I rejected his evidence.

I was satisfied from the evidence that when Wong obtained the advances by way of letters of credit he did so on behalf of the defendant company and that Hii Yii Pan (DW2) was fully aware of what Wong had done. Wong was the main shareholder of the defendant company and he ran and managed the business. He executed the Guarantee with Ong Say Beng who is also a director on behalf of the company. In my view in executing the Guarantee he did so with the concurrence of the other two directors. However I am fully aware that there are *dicta* in some of the English cases suggesting that a Chairman of a company does not have unlimited authority to bind the company merely by virtue of his office and it is for this reason that I earlier commented upon the fact that the execution of the Guarantee must be considered in the light of the surrounding circumstances prevailing at that time which, if I may reiterate, is this: Wong was the driving force of the company; he did what he liked by virtue of the fact that he owned the majority of the shares and apparently knew the business well while the others merely acquiesced to whatever was done by him. I am fortified in this view by the fact that when Hii Yii Pan received AB1 (Pink) which is a letter of demand sent by the plaintiffs' solicitors to him, although he said in evidence that he was shocked when he received it, he did nothing about it which clearly indicates he was fully acquainted with the position and the letter came as no surprise to him. If in fact the Guarantee was executed without his knowledge he should in the normal course of business have reacted by denying its existence forthwith, repudiating it and even challenging its authenticity; however, he remained silent and did nothing.

Now section 133A of the Companies (Amendment) Act (No. 10 of 1974) reads as follows: —

"Subject to the provisions of this section, it shall not be lawful for a company:—

(a) to make a loan to another company;

(b) to enter into any guarantee or provide any security in connection with a loan made to another company by a person other than the first-mentioned company, if a director or directors of the first-mentioned company is or together are interested in shares in the other company of a nominal value equal to one-fifth or more of the nominal value of its equity share capital."

This amending section came into force on November 15, 1974, some 3½ months after the entry into the Guarantee. It is therefore irrelevant to this action.

It is necessary in construing the section to give effect to two fundamental principles of statutory interpretation, namely: —

(i) "that no statute shall be construed to have a retrospective operation unless such a construction

appears very clearly in the terms of the Act, or arises by necessary and distinct implication" — *Maxwell* on Interpretation of Statutes, 12th Edition page 215; and

(ii) that "if there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged" (*Ibid* page 240).

To give to the section the meaning contended for by the defendants would violate both principles.

The conduct penalised by the section is the entering into of a guarantee. Section 133A of the Companies Amendment Act came into operation on November 15, 1974 and affects all guarantees made on or after that date. The present Guarantee was entered into on July 31, 1974 although the advances were made after November 15, 1974. The section said nothing at all which could or might invalidate any guarantee already entered into at that date nor its performance, enforceability or discharge. The Guarantee made on July 31, 1974 is expressed to be "a continuing guarantee"; it is not a succession of separate guarantees.

There is no reason or justification for giving the section retrospective effect. To do so would have invalidated overnight a large number of guarantees held by banks and others, in good faith as security, in Singapore and would involve a large number of perfectly respectable guarantors in the commission of criminal offences, a result which it is inconceivable the legislature could have intended without express terms.

Lastly, has a demand been made? There can be no doubt that the answer to this question is in the affirmative, and the defendants do not appear seriously to dispute this. The various demands made are referred to in paragraphs 4 and 5 of the statement of claim. Any one of these is sufficient for the plaintiffs to succeed.

From the evidence, I find that the Directors of the defendant company were fully aware that Wong Kee Loh had executed the Guarantee on behalf of the defendants and it was done with their consent and acquiescence. In the circumstances there will be judgment for the plaintiffs for the amount claimed with interest and costs.

Claim allowed.

Solicitors: *Chung & Co.; Y.M. Jumabhoy & Co.*

MARY-ANN ARRICHIELLO v. TANGLIN STUDIO PTE. LTD.

[O.C.J. (Chua J.) October 14, 1980]
[Singapore — Suit No. 3205 of 1979]

Contract — Specific performance — Payment of booking fee — Cheque deposited with solicitors — Whether there was an agreement to enforce.

Housing developers — Deposit of booking fee — Claim for specific performance or damages — Whether there was an agreement — Housing Developers (Control & Licensing) Act (Cap. 250), ss. 4 & 21 — Housing Developers Rules 1976, r. 11.

The plaintiff in this case sought for specific performance by the defendants, housing developers, of an agreement between them for the sale by the defendants of a maisonette unit at Leonie Hill. In the alternative the plaintiff claimed damages for breach of the said agreement. The facts revealed that the plaintiff had already paid a booking fee of $2,000 payable to the defendants' solicitors through one Mr. Zee. The price of the maisonette was confirmed at $130,000 in a letter of January 13, 1979 by the defendants addressed to the plaintiff. The plaintiff wrote a letter of September 11, 1979 regarding the purchase of the said maisonette. On October 1, 1979 she received a letter from the defendants stating that they had decided not to sell the maisonette and they accordingly returned her said cheque. On October 26, 1979 the plaintiff commenced proceedings.

Held, allowing the plaintiff's claim: (1) the Housing Developers (Control & Licensing) Act (Cap. 250) merely prescribes a method of performance by the housing developer for the protection of a class of persons — the purchasers — as far as possible from the risk of exploitation. The said Act does not in any way prohibit the making of a contract for the sale and purchase of flats;

(2) in this case the contract between the plaintiff and the defendants was not illegal and was enforceable.

Cases referred to:-

(1) *Auerbach* v. *Nelson* [1919] 2 Ch. 383.

(2) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] A.C. 304; [1962] M.L.J. 152.

(3) *Yeo Long Seng* v. *Lucky Park (Pte.) Ltd.* [1971] 1 M.L.J. 20.

(4) *Daiman Development Sdn. Bhd.* v. *Matthew Lui Chin Teck & Anor.* [1978] 2 M.L.J. 239.

CIVIL SUIT.

Lee Han Yang for the plaintiff.

G. Murugaiyan for the defendants.

Cur. Adv. Vult.

Chua J.: The plaintiff seeks specific performance by the defendants, who are housing developers, of an agreement between them for the sale by the defendants of a maisonette unit in a seventeen storey block of flats built by the defendants at Leonie Hill. The plaintiff says that the agreement is evidenced by a letter dated January 13, 1979, from the defendants to her. Further and in the alternative, the plaintiff claims damages for breach of the said agreement and/or such other relief as the court thinks fit.

The plaintiff, who lives in Leonie Hill opposite the defendants' block of flats, testified that in November, 1978, she made inquiries at the Leonie Hill construction site of the defendants about apartments being built there for sale. She was directed to see Mr. Barry Zee at the worksite office. Following her interview with Zee the defendants sent her some floor plans and a price list on November 22, 1978 (AB1 — AB4). Later she telephoned Zee and told him that she was interested in purchasing the maisonette marked as A1/3 at its list price of $129,600 and Zee told her that she had to pay a booking fee of $2,000. She said that she was going away and Zee told her that he would hold the maisonette until her return. In early January, 1979, she called Zee to make an appointment to pay the deposit. On or about January 3, 1979, she went to see Zee. He told her to make out a cheque of $2,000 payable to the defendants' solicitors. He also told her that the price of the Unit had been increased as they were going to put on better tiling but he could give the unit to her for $135,000.